UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADVANCEPIERRE FOODS, INC.,

"Respondent"

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 75, AFFILIATED WITH THE UNITED FOOD AND COMMERCIAL WORKERS, INTERNATIONAL UNION,

"Charging Party"

Cases 9-CA-153966
9-CA-153973
9-CA-153986
9-CA-154624
9-CA-156715
9-CA-156746
9-CA-159692
9-CA-160773
9-CA-160779
9-CA-162392

RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. INTRODUCTION.

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Respondent AdvancePierre Foods, Inc. ("Respondent") hereby submits this Answering Brief to the Cross-Exceptions to Administrative Law Judge David I. Goldman's Decision ("ALJD") filed by the counsel for General Counsel. In the Cross-Exceptions, the General Counsel asks the Board to impose novel remedies that fall outside the bounds of existing Board law. In terms of the substantive law, the General Counsel's other exceptions, which concern the alleged solicitation of authorization cards, interrogation of Sonja Guzman and Respondent's long-planned pay raise, all miss the mark.[1]

II. THE GENERAL COUNSEL'S EXCEPTIONS.

A. The General Counsel Continues to Misread Board Law on Solicitation of Withdrawal of Union Authorization Cards.

Try as the General Counsel might to suggest otherwise, the record facts and Board law do not support a violation of Section 8(a)(1) with respect to Respondent's communications to employees concerning the withdrawing of union authorization cards. The General Counsel first recounts the 5-6 meetings Respondent's supervisors had with employees about union cards in which they "addressed the Union campaign." (GCB 4). During those meetings, according to the General Counsel, "anti-Union literature" was disseminated, and "Respondent made such literature available to employees in the hallway." (GCB 4). All of this is fully permissible under the Act and solidly within Section 8(c) and NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). The General Counsel next suggests that there is "no evidence of any employee questioning Respondent on the topic of card revocation prior to these meetings . . ." The General

[1] References to the General Counsel's Cross-Exceptions are designated as (GCB _____); references to the trial transcript are designated as (Tr. _____); references to the General Counsel's exhibits are designated as (GC Ex. _____); and, references to Respondent's exhibits and the Union's exhibits are designated as (Resp. Ex. ___) and (U. Ex. _____), respectively

Counsel is wrong. Renee Chernock testified to precisely that. According to her, a number of employees asked how they could withdraw their authorization already given under duress. (Tr. 635:3-18). That three known Union supporters testified at the hearing that they did not ask for revocation information is meaningless; it does not establish that none of the other 590 or so employees plus failed to ask as well. In response to those requests for information on card revocation, APF communicated in a written memo that "if you signed a card and wanted to withdraw your support, the UFCW must give it to you." (G.C. Ex. 19-7). Respondent's rationale for the memo was very evident in the memo -- "Many of you have told that us that you signed a union authorization card without understanding that it is a legal statement authorizing the UFCW Local 75 to represent you. You have asked us how to withdraw your card."

As the ALJ found, employers have the right under Section 8(c) to present employees with an accurate and nonthreatening description of how to resign. (ALJD 7). "Where the idea of revocation was initiated by employees, the fact that the employer gives information to employees as to, and actually assists in, the mechanics of revocation is not violative of the Act if the employee has the opportunity to continue or halt the revocation process without the interference or knowledge of the employer." Hydro-Forming, Inc., 221 NLRB 581, 583 (1975), *citing* Jimmy Richards Co., Inc., 210 NLRB 802 (1974) (no violation of Act where employees initiated the requests to withdraw, the employer gave letters to the employees so that they could deliver them to the Union, and did not keep copies for its files). Indeed, the Board's definition of "solicitation" includes something more than the mere explaining to employees how revocation may be accomplished. Holly Farms Poultry Industries, Inc., 194 NLRB 952 (1972). Moreover, APF's communication to employees did not threaten or promise any benefit if employees

revoked their card, and APF's actions did not require employees to inform management of whether they availed themselves of the revocation opportunity. (ALJD 7).

The General Counsel's argument that the ALJ misapplied Space Needle LLC, 362 NLRB No. 11 (Jan. 30, 2015) misses the mark because it ignores that employees came to Respondent to ask questions about revoking signed cards. Respondent's employee communications were not "unprompted," as the communication itself makes clear. (G.C. Ex. 19-7; ALJD 7).

The General Counsel next argues that the ALJ "failed to apply the remaining portion of the doctrine," that being whether Respondent created "an atmosphere wherein employees would tend to feel peril in refraining from revoking." Space Needle LLC, supra, at *9. In fact, the ALJ did closely examine this precise question in his decision. He concluded that the claimed ULP's in this case "do not rise to the scope and level found in other cases. . ." (ALJD 7). The ALJ found it significant that these employee meetings and the communication in question came early in the campaign. Id. Specifically, the ALJ discussed at length the Mohawk Industries, 334 NLRB 1170 (2001) case cited by the General Counsel. The ALJ easily distinguished the serious threats in that case of plant closure, discharge, and black listing of union supporters from Respondent's short meeting about a mistakenly superseded non-solicitation policy that ended in a hug. (ALJD 7-8). The same can be said for the other cases cited by General Counsel and analyzed by the ALJ, such as Vestal Nursing Home, 328 NLRB 87 (1990). In that case, the unsolicited assistance rendered by the employer was well beyond passive (and well beyond Respondent's here). The nursing home actually provided envelopes and forms, and mailed them on behalf of the employee. Id. at 102. The ALJ's conclusion that "these cases do not advance the General Counsel's position here" remains correct.

At page 6 of the brief, the General Counsel harangues the ALJ for "particularly minimiz(ing) the chilling effect of targeting union supporters regarding their authorization to work in the U.S. . . ." (GCB 6). This is surprising, because at the hearing, in response to the General Counsel's rank speculative arguments and questions about an alleged heightened employee "chill" due to a large population of minorities, the ALJ was of the view such a claim was a novelty, and asked the General Counsel to support the speculative argument with case law. (Tr. 105-14). Throughout the hearing, the ALJ gave the General Counsel countless opportunities to make an offer of proof on employee "chill" or to present case law that support its speculative theory that "chill" evidence can impact special remedies. (Id.). The General Counsel did not avail themselves of any opportunity. (Tr. 308-312). Similarly, no case law was presented in the briefing to support the General Counsel's specious theory that the Board should or will look at employees' subjective reactions to alleged unfair labor practices as a basis for a special remedy. To the contrary, the Board has explicitly and continuously stated that it will not look to employees' subjective opinions. Echostar Techs., L.L.C., 2012 NLRB LEXIS 627 at *25 (2012) (the determination of chilling effect is a reasonable one and does not turn on subjective impact evidence from particular employees) (*citing* Waco, Inc., 273 NLRB 746, 748 (1984)). Zero facts or law support this argument, and it should be rejected. To criticize the ALJ for not considering "evidence" the General Counsel failed to adduce at hearing despite several chances is remarkable.

In addition, it remains an accurate statement of law that if employees signed a card and want to withdraw their support, the union must give it to them. R. L. White Company, Inc. 262 NLRB 575, 576 (1982) ("an employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor

offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation."). The General Counsel's only rebuttal to this clear authority was to claim (without any case law support) that "it is not categorical that a union must return a card if revoked. (GCB 6). Categorical or not, it is not violative of the Act.

B. The General Counsel Waived the Allegations Concerning Whether Guzman was Unlawfully Interrogated.

Nowhere in the General Counsel's 60-page Post-Hearing Brief was it alleged or argued that Respondent unlawfully interrogated Sonja Guzman by Ramirez and Chernock on June 8. Consequently, the ALJ rightfully concluded the General Counsel abandoned the claim. To now raise that claim belatedly in a Cross-Exception is untimely. Accordingly the ALJ's decision to dismiss paragraph 5(f) was warranted.

C. Respondent's Wage Increases at All of Its Protein Plants Did Not Violate the Act.

The General Counsel excepts to the ALJ's dismissal of the allegations concerning Respondent's August 30 wage increase at all seven of its protein plants. (Paragraphs 5(j) and 6(f) of the Complaint). The General Counsel's arguments are two-fold: 1) the ALJ erred in concluding Respondent met its burden to prove it would have implemented the wage increase in the absence of union activity; and 2) the ALJ erred in finding that Respondent established a legitimate business reasons for announcing the wage increase on July 15. The General Counsel is wrong on both accounts.

Respondent presented a host of contemporaneous documents and emails, as well as credible testimony, that definitively established that its wage review project was identified for Sue Brunker, Respondent's Director of Compensation and Benefits, as a priority when she joined Respondent in June, 2014. The documents and testimony establish that the wage review project kicked off in July, 2014. (Tr. 962-63). It was broadly discussed in the summer and fall of 2014, backburnered for a

while due to other more pressing issues like an audit, and then returned to the front burner in early February, 2015. (Tr. 973-75; Resp. Ex. 25). Brunker's goal at that time was "fast track" the wage evaluation project, as her emails establish. The work was complex, with 490 different job titles and 89 different pay grades across the seven protein facilities. (Resp. Ex. 30; Tr. 977; Resp. Ex. 25; ALJD 43).

Recognizing this compelling evidence and timeline, the General Counsel attempts to skirt it by suggesting that the organizing campaign "began as early as March." (GCB 6). The problem with this argument is that Respondent did not know about the nascent campaign until May, 2015. (Tr. 500). Thus, the General Counsel's crude attempt to "pre-date" Brunker's work fails.

By the time the Union campaign came above ground, Brunker had made serious tracks on the project, as evidenced by the email traffic between Brunker and senior leadership. (Resp. Ex. 28-29). Brunker's testimony also provided an in-depth explanation as to why the increase was necessary across all seven of Respondent's protein facilities, not just the Cincinnati plant. Alarmingly high turnover and difficulty in attracting and retaining personnel were the key drivers, as the wage rates had not been updated in years. (Tr. 959-60). Brunker's task was particularly challenging and time-consuming because many of these plants had been purchased and run previously as independent businesses, all with their own particular and peculiar job titles, pay scales, and compensation philosophies. (ALJD 43). By May, 2015, the draft analysis was in place and being reviewed for internal equities. (Tr. 983-84; Resp. Ex. 28-29). By June and July, 2015, Brunker and her team had collapsed the 490 job titles into 60 and 89 pay grades to 13. (Resp. Ex. 30). By July, Respondent was ready to announce the plan, with raises effective August 30. (Tr. 497; GC Ex. 30-31).

The Board has previously recognized that the fact that an employer announced simultaneous wage increases at other plants in which no campaign was ongoing was critical in determining whether the employer's pay increase was lawful at the plant being organized. In Essex International, Inc., 216 NLRB No. 101 at 576-77 (1975), the Board held that "It is somewhat inconceivable that the Employer would have offered increased wages . . . to all three plants in order to thwart the union campaign at only the Traverse City facility." Here, the only difference is that there were six other plants, not three, and the union campaign was ongoing in Cincinnati, not Traverse City.

The General Counsel's arguments about the timing of Respondent's announcement on July 15 for an August pay increase are easily addressed. The General Counsel offers that Respondent's announcement was "very clearly timed to discourage employees' union activity." Next the General Counsel claims, ". . . Respondent had to know that petition for election was forthcoming." (GCB 9). This is pure speculation. In point of fact, the election petition was not filed until December, six months later. This proves the point made by the ALJ, who succinctly summed up the General Counsel's position on timing as "no time is the right time to announce a wage increase." (ALJD 49). As the ALJ held, a union campaign cannot serve as a "padlock on an employer's ability to update and revamp its operations, including its wage structure -- changes it would have made in the absence of union activity." (Id.). Respondent established that July 15 was not arbitrary, that it was the product of months of diligent work and thoughtful analysis, and the timing had nothing to do with the Union.

The General Counsel next argues that the ALJ "erred in not giving sufficient consideration, analysis, and/or weight to Senior Vice President of Human Resources Chuck Aardema's email concerning the announcement's effect on employees, which as quoted by the General Counsel in

their brief, ". . . communication on the new salary structure next week should provide a positive boost for those in the Cincinnati plant." (GC 59). The other pertinent part of Aardema's email omitted by the General Counsel above was Aardema's lead in: "while not related to the union situation." The ALJ did not omit this part of the memo from his analysis, and clearly understood it for what it was.

D. A Notice Reading and Publication Requirement are not Appropriate Remedies.

Despite the General Counsel's request for a notice reading and notice publication, the ALJ rejected that request, finding that "the General Counsel has failed to make its case that traditional remedies are insufficient to remedy the effects of the unfair labor practices." (ALJD 59). Addressing that request for extraordinary remedies, the ALJ noted his "strong feeling that . . . the General Counsel's remedial demands are unwarranted based on the violations found." (ALJD 58).

His "strong feeling" is rooted in decades of Board precedent. In First Legal Support Services, LLC, 342 NLRB 350, 350 fn. 6 (2002), the Board reiterated that special notice remedies, such as a notice reading, are appropriate in only extraordinary circumstances where traditional posting is insufficient to dissipate the effects of ULP's. See also Carborex Coal, Inc., 314 NLRB 421, 421-22 (1994) (same); Fallbrook Hospital, 360 NLRB No. 73 at *1, *24 (April 14, 2014) (same). Ishikawa Gasket America, Inc. places that standard in context. There the Board found that the employer committed multiple violations of the Act, including unlawfully discharging a union supporter, discharging an entire management faction to dissuade organizational activity, paying an employee to surveil union activity, and falsely attributing inflammatory racial remarks to the union. 337 NLRB 175, 175, 183-89 (2001), aff'd., 354 F.3d 534 (6th Cir. 2004). Yet even given the number and seriousness of those violations, the Board

did not find the violations sufficiently egregious to warrant a notice reading. Id. at 176; see also Teddi of Calif., 338 NLRB 1032, 1041 (2003) (holding that while numerous Act violations were "certainly very serious," the violations could "be remedied, and the employees' Section 7 rights protected, by means of the standard Board remedy").

Here, the ALJ carefully considered and rejected the General Counsel's hyperbolic characterizations about how outrageous Respondent's conduct was, concluding that "the General Counsel's characterization of them exceeds their 'substance.'" (ALJD 58). With a large unit, and only one of the alleged ULP's considered hallmark, the ALJ easily and correctly pointed to a host of Board law where extraordinary remedies requested by the General Counsel were denied in cases involving significantly more egregious conduct than for which the ALJ found Respondent to be in violation of the Act. See, e.g., Perry Brothers Trucking, 364 NLRB No. 10, slip op. at 3 fn. 6 (2016), and Checkers and Fast Food Workers Committee, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016). The General Counsel continues to rely on OS Transport LLC, 358 NLRB 1048 (2012) to support its requested imposition of extraordinary remedies against Respondent, even though the ALJ effectively distinguished that case in his opinion based on the size difference in the unit but more importantly on the "many more severe and hallmark violations of the Act." (ALJD 59).

The General Counsel's argument that a notice reading is necessary because at least five languages are spoken in the workplace is non-sensical. (GCB 14). The ALJ addressed this in his proposed remedies by requiring Respondent to post the Notice in English and Spanish, as well as "any such language as the Regional Director determines . . ." (ALJD 58). Similarly, the General Counsel next argues that publication is warranted because of how widely disseminated in the public Respondent's acts were, through rallies, numerous articles, a radio program, and to its

customers. The irony here, of course, is that it was the Union that was the sole pusher of this misinformation. The General Counsel omits this tidbit from its analysis, but the ALJ did not, addressing this very point in footnote 59.

The cases cited by the General Counsel in support of the extraordinary request for notice reading and publication demonstrate how far the General Counsel is overreaching. In Pacific Beach Hotel, 361 NLRB No. 65 (slip op. at 7) (October 24, 2014), the employer waged a 10-plus year war on the Board, with pervasive and repeated violations over that stretch. The Board itself described the employer as having a "prolonged defiance" of the Act and the Section 7 rights of the employees. As the basis for its imposition of the extraordinary remedies, the Board stated:

> Despite having been found in violation of multiple provisions of the Act, having been found to have engaged in objectionable conduct that interfered with elections on two occasions, having been subject to two Section 10(j) injunctions, and having been found in contempt of court for violating a Federal district court's injunction, the case before us demonstrates that the Respondents *still have not complied* with the remedial obligations imposed on them during our earlier encounters. Rather, they have continued to engage in unlawful activity, some of which repeatedly targeted the same employees for their protected activity and detrimentally affected collective bargaining. Slip op. at 2 (emphasis in original).

In Three Sisters Sportswear Co., 312 NLRB 853, 854 (1993), another case heavily relied upon by the General Counsel, the employer was found to have threatened plant closings, verbally abused its employees through a "barrage of obscenities" and blocked its employees from exiting the premises. (Id. at 880). Evidence established that supervisors clapped at the employees when they looked up from their work, and that five union supporters were laid off or discharged. (Id.).

Here, the ALJ's determinations about Respondent's conduct are worlds away from the number and severity of violations necessary under existing Board law to warrant a notice-reading or publication. Consequently, the Board should decline the General Counsel's invitation to overreach.

E. The General Counsel's Training Requirement and Requirement to Furnish Periodic Employee Contact Information is Another Huge Overreach.

Next, the General Counsel excepts that the ALJ erred by not requiring Respondent to provide paid training for all of its production employees and for all of its supervisors and managers, conducted by a Board agent.[2] The General Counsel cites to J.P. Stevens & Co., Inc., 244 NLRB 407 (1979) to support its exception. Even a cursory review of the J.P. Stevens decision demonstrates the absurdity of this request, in view of the record facts. To liken the actions of Respondent (as determined by the ALJ or even as alleged by the General Counsel) to the defiant actions of J.P. Stevens, and its "program of experimentation with disobedience of the law" demonstrates a complete loss of objectivity and perspective by the General Counsel. As the Board recounted in its 1979 decision, J.P. Stevens had been engaged in, since 1963, "persistent, long continued, flagrant violations occurring after and in spite of repeated declarations of illegality by Board and reviewing courts." Id. at 456, n. 4. In one of those many, many court battles, the Second Circuit allowed that J.P. Stevens has earned its "reputation as the 'most notorious recidivist' in the field of labor law." 96 L.R.R.M. 2150, 2152, 2159. Given this lengthy background of willful disobedience over 15 plus years, the General Counsel has again wildly overshot its mark here in comparing Respondent's actions in a single hard-fought union campaign to those of J.P. Stevens. The training exception should be dismissed.

As to the request for employee contact information, again, the scant cases where this extraordinary remedy has been invoked all have involved far more serious, sustained, and far-reaching conduct than the determinations or allegations here. For example, in Federated Logistics & Operations, 340 NLRB 255 (2003), a case relied upon by the General Counsel, the Board noted that just days before the election, the employee withdrew a planned wage increase

[2] Respondent incorporates by reference its arguments advanced above in Subsection D concerning the General Counsel's requests for extraordinary remedies.

and also warned of a strike and subsequent plant shutdown. Not only did these actions interfere with the election, but they also warranted extraordinary remedies. These types of "insidious reminders to employees" present in the Federated Logistics & Operations case are completely absent in the alleged or determined conduct of Respondent. Moreover, the Regional Director certified the election results months ago, after determining that General Counsel's and Union's arguments to overturn the overwhelming results were without merit.

Undaunted, the General Counsel again trots out its ill-fated and unsupported "chill" argument concerning the diversity of Respondent's workforce to support it. It should be dismissed out-of-hand, as the General Counsel was given every opportunity to pursue this novel theory at hearing, but chose not to do so. They provided no case law to support the theory, despite requests at the hearing by the ALJ, and failed to make the requisite offer of proof when the ALJ gave the General Counsel an opportunity to do so. They cannot now elect otherwise. Moreover, the ALJ, demonstrating an abundance of patience, authored a thoughtful rejoinder to the merits of the General Counsel's chill argument in footnote 60 of his decision. In rejecting the merits, he found ". . . no evidence that Respondent has general targeted immigrants in the workforce, or used threats or language to stoke immigration-related fears. . . ." (ALJD 59; n. 60). Moreover, he again correctly rejected the application of cases like Concrete Form Wall, Inc., 346 NLRB 831, 839 (2006) to these facts, finding that case to be "studded with hallmark violations absent here." (ALJD 60; n. 60).

All in all, the General Counsel's attempts to have the Board invoke its extraordinary remedies against Respondent are unpersuasive. As the ALJ found:

> Other than the one suspension, these unfair labor practices do not constitute direct threats to the pay, benefits, or jobs of employees. There were no threats of plant shutdowns, or about the futility of unionization. No argument is made that the Respondent has a history of or proclivity to repeat these unfair labor practices. I

> do not find that the Respondent's conduct rises -- or more aptly, sinks -- to the level of egregious employer conduct that justifies the imposition of additional remedies. While the Respondent has engaged in unlawful conduct, these are not unfair labor practices that one would expect could not be remedied through traditional remedies. I conclude that under these circumstances, the General Counsel has failed to make its case that traditional remedies are insufficient to remedy the effects of the unfair labor practices.

(ALJD 59).

F. The General Counsel's Requested Remedies for Diana Concepcion are Unwarranted Under Board Law.

The General Counsel's request for consequential damages for Diana Concepcion is inappropriate and inconsistent with the Act. While the Act applies to undocumented workers, federal immigration policy, as expressed by Congress in IRCA, forecloses the Board from awarding backpay to an undocumented alien who has never been legally authorized to work in the United States. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (Board found employer had selected the employee and others for layoff in order to rid itself of known union supporters, but because the employee, who had originally presented documents that appeared to verify his authorization to work in the United States, admitted that he had never been legally admitted to, or authorized to work in the United States, employee was not entitled to an award of backpay). At this point, Concepcion has refused to provide any evidence of her ability to lawfully work in this country. Respondent attempted to question Respondent at the hearing about this point, but was foreclosed from doing so. Because she has not and cannot establish such closure, an award of backpay, including consequential damages, is inappropriate.

Such an award is also inappropriate regardless of Concepcion's refusal to provide evidence of her lawful ability to work in the United States because current Board law does not permit such non-remedial compensatory damages. Goodman Logistics, LLC, 363 NLRB No. 177, slip op. at 2-

3, fn. 2 (2016). The ALJ so found in footnote 58, and his ruling was correct under extant Board law.

III. CONCLUSION

For all these reasons, as well as the arguments articulated in Respondent's Exceptions Brief and Reply Brief, the General Counsel's Exceptions should be rejected in totality.

Dated this 12th day of September, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2016, I electronically filed the foregoing through the National Labor Relations Board website (www.nlrb.gov).

I further certify that a copy of the foregoing was served via U.S. Mail on September 12, 2016 on the following:

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I further certify that a copy of the foregoing was served upon the following via email on September 12, 2016:

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